No. 82-1393

IN THE

Supreme Court of the United States

October Term, 1982

In the Matter of the Petition

of

ROBERT R. KAUFMAN,

Petitioner,

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT,

Respondent.

On Petition for Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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Questions Presented

I. Whether an attorney is obliged to answer questions and produce documents relating to an investigation of a complaint of professional misconduct against him.

II. Whether a disciplinary agency may compel an attorney to produce documents and records and respond to allegations of professional misconduct lodged against him.

III. Whether the statements and records so obtained may be used against the attorney in a subsequent disciplinary proceeding.

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Jurisdiction

The petitioner invokes the jurisdiction of this Court via 28 U.S.C. Section 1257(3).

Statement of the Case

Petitioner was admitted to practice as an attorney and counselor-at-law in the State of New York on February 2, 1938. On June 2, 1962, the Committee on Grievances (predecessor to the respondent) commenced a disciplinary proceeding against petitioner and served a petition charging him with professional misconduct. A supplemental petition charging additional acts of misconduct was filed on November 17, 1964. After a lengthy hearing, the referee appointed by the Appellate Division to hear the charges of misconduct filed his report with that Court on September 24, 1965. On February 3, 1966, the Appellate Division confirmed the report, sustained six of nine charges of misconduct and disbarred petitioner.

One of the charges presented in the disciplinary proceeding was that petitioner had converted the settlement proceeds received on behalf of a client. In his defense of that charge, petitioner contended that his client had loaned him the monies in question and that in consideration for that loan, petitioner issued a partial assignment of the proceeds of an insurance claim. The referee sustained the conversion charge, apparently rejecting petitioner's defense. Neither during this proceeding, nor during any subsequent proceeding, was petitioner charged with taking fraudulent assignments. The finding by the referee that he had made fraudulent assignments was not a predicate for the Appellate Division's findings of professional misconduct.

Petitioner has made numerous applications for leave to appeal, reargument, rehearing, and reinstatement, all

of which have been denied by the Appellate Division. In 1967, petitioner filed a petition in this Court for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department. He contended, as he does here, that his constitutional rights had been abridged because he was compelled, under threat of disciplinary action, to produce evidence which was subsequently used against him in the disciplinary proceeding. This Court rejected petitioner's argument and denied the 1967 petition for a writ of certiorari.

In January 1982, petitioner served respondent with a subpoena *duces tecum*, and again moved to vacate the 1966 Appellate Division order disbarring petitioner. On March 16, 1982, the Appellate Division denied the motion and quashed the subpoena. Petitioner's motion for reargument was denied by the Appellate Division on June 24, 1982. And, on October 21, 1982, the New York Court of Appeals dismissed petitioner's appeals from the above orders.

ARGUMENT

I.

A disciplinary agency's request for an attorney's statement and records in response to a complaint of professional misconduct does not constitute an illegal search and seizure nor does the use of this information in a subsequent proceeding violate the Fifth Amendment.

Petitioner's contention that a written communication from the Grievance Committee requiring his cooperation in producing records and other data was coercive and threat-

ening and, as such, constituted an illegal search and seizure lacks merit.

At the outset, it should be noted that disciplinary proceedings based upon charges of professional misconduct are civil in nature, *Matter of Zuckerman*, 20 N.Y. 2d 430, *cert. den.* 390 U.S. 925 (1968). Thus, these proceedings are not subject to the same strict standards which due process demands in a criminal case. Petitioner's attempt to identify disciplinary with criminal proceedings ignores the balance which must be struck between society's interests in the regulation of attorneys and the rights of the individual attorney. The determination of the particular procedural safeguards which due process requires depends upon the nature of the proceeding, the interests of the government and those of the individual. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Petitioner incorrectly argues that *Spevack* v. *Klein*, 385 U.S. 511 (1967), expanded the constitutional privilege against self-incrimination to include the threat of disciplinary action for an attorney's failure to cooperate with an investigation into allegations of professional misconduct. *Spevack* held only that an attorney could not be disbarred for exercising his right to not answer questions which might tend to incriminate him, since he would still be subject to criminal prosecution. *Spevack* is a "compulsion" case and cannot be read to expand the scope of the constitutional guarantee to cover the threat of disciplinary action. Petitioner's reliance on *Garrity* v. *New Jersey*, 385 U.S. 439 (1967), is similarly misplaced. The *Garrity* Court held that prosecutors, in a criminal case against

police officers accused of corruption, could not use incriminating statements obtained under threat of job loss upon refusal to answer for any reason.

Petitioner's argument that inculpatory evidence was obtained from him in violation of the Fifth and Fourteenth Amendments is based upon the erroneous assertion that the above-cited cases broadened the scope of the constitutional guarantee against self-incrimination. An attorney has no right to not answer questions in a disciplinary investigation unless his answers might subject him to *criminal* liability. No such claim is made here.

The Committee on Grievances properly introduced evidence obtained from petitioner during its investigation, and the Appellate Division properly considered this evidence.

II.

The referee's finding relating to the fraudulent assignment issue was not a predicate for the Appellate Division's disbarment of petitioner.

Petitioner was disbarred in 1966, in part, because the Appellate Division found that he converted settlement funds belonging to a client. The referee who heard the charges rejected petitioner's defense that his client had loaned him the money. The referee concluded that respondent's witnesses were not credible and that respondent had made fraudulent assignments to his clients.

Petitioner speciously contends that he was denied due process because his disbarment was predicated on the finding that he had made fraudulent assignments and he had

had no notice that this allegation was part of the charges against him. He speculates that the finding "had a bearing on the determination that disbarment was an appropriate sanction."

It is clear from the record below that petitioner was never charged with making fraudulent assignments and that this conduct was not the predicate for the Appellate Division's disbarment order. *In re Ruffalo*, 390 U.S. 544 (1968), relied upon so heavily by petitioner, does not apply here. Ruffalo's disbarment was predicated upon testimonial admissions to misconduct unrelated to the charge that was the subject of his disciplinary hearing. This Court held that Ruffalo did not have adequate notice of the charges against him.

By contrast, the referee below quite properly limited his references to the assignments in question to their bearing upon his assessment of the credibility of petitioner's witness. The referee did not find that petitioner was guilty of professional misconduct in making fraudulent assignments, nor can it be said that the Appellate Division disbarred petitioner on that ground.

III.

Petitioner's subpoena *duces tecum* was defective on its face.

Petitioner contends that exculpatory material was improperly withheld from him because the Appellate Division quashed a subpoena *duces tecum* served upon respondent. Although the Appellate Division granted respondent's

cross-motion to quash the subpoena without opinion, it is readily apparent from a cursory reading of the Appellate Division's Rules that petitioner's subpoena was defective on its face because it did not bear the endorsement of the Clerk of the Court, as required by Part 603.5 of the court's Rules (22 N.Y.C.R.R. §603.5 (McKinney)).

The Court of Appeals properly declined to review the Appellate Division's order granting the cross-motion.

IV.

Petitioner's challenge to New York's disciplinary scheme is not properly raised in this Court.

It is undenied that attorneys are entitled to due process of law in disciplinary proceedings. *Spevack* v. *Klein*, 385 U.S. 511 (1967). The procedures for disciplinary proceedings established by the New York State Legislature and by the Appellate Divisions of the State of New York have been held to satisfy the requirements of due process. *Mildner* v. *Gulotta*, 405 F. Supp. 182, 211 (E.D.N.Y. 1975).

Petitioner raises *ab initio* the objection that in New York the prosecutor in disciplinary matters is under the supervision of the Appellate Division and, therefore, that there is no separation of the prosecutorial and adjudicative functions. Petitioner did not raise this issue in the state courts, and thus is barred from raising it here.

Furthermore, even if this Court considers the issue, the inherent power of the Appellate Divisions to license, investigate and discipline attorneys admitted to practice in New

York has been repeatedly upheld as constitutional and proper. Petitioner has made no showing that he was in any way harmed or prejudiced by the fact that the Grievance Committee prosecuted him and the Appellate Division disbarred him.

Conclusion

For the reasons stated above, respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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